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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of
Amendment of the Commission's
Rules to Establish New Personal
Communications Services

GEN Docket No. 90-314
ET Docket No. 92-100

To: The Commission

REPLY COMMENTS OF
CELLULAR COMMUNICATIONS, INC.

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Summary

Cellular Communications, Inc. ("CCI") submits that the overwhelming majority of factual and empirical support presented to the Commission in this proceeding warrants the eligibility of cellular carriers for full participation in PCS, including licenses in markets where they now operate cellular systems. Combined cellular/PCS operations would provide significant public benefits through the resulting economic efficiencies, while the multiplicity of competing mobile communications service providers would inhibit any conceivable unfair competitive advantages. Furthermore, the emerging PCS industry and its end users will benefit from the participation of experienced, dedicated service providers, both directly and through the attraction cellular providers would offer to the financial community.

The comments also support licensing PCS through auctions and regulating PCS as private radio in parity with a reregulated cellular service. CCI submits that the needs of the public and the long-term interests of the American communications system demand the additional political and administrative efforts to implement these measures.

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Cellular Communications, Inc. ("CCI"), by its counsel, respectfully submits these Reply Comments in response to the initial comments submitted by interested parties in response to the Commission's Notice of Proposed Rule Making and Tentative Decision in the above-captioned proceeding.¹

I. The Comments Support Allowing Cellular Providers to Apply for PCS License in All Markets.

A majority of the commenters addressing the issue support cellular carriers' entry into PCS within their existing markets. Indeed, fewer than twenty-five percent of the parties that filed comments advocated the exclusion of cellular providers from

¹ Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 F.C.C. Rcd. 5676 (1992) ("NPRM").

PCS in markets where they currently operate. Most of these were quite obviously motivated by a desire to preempt competition from qualified potential entrants who have developed expertise and a record of accomplishments in providing wireless telephone service. Other comments provided little support for their bare assertions that participation by cellular licensees would "crush competition,"² or would be "highly anti-competitive."³

The exclusion of an entire class of qualified potential competitors from PCS is an extreme measure. As a result, the proponents of such a position bear a heavy burden to justify their anti-competitive position. Even a superficial examination of the record shows that they have not carried that burden.

² Letter of American Personal Communications ("APC") Chairman, Wayne Schelle, to Chairman Alfred C. Sikes, November 9, 1992. But see APC Comments, at 65 (ownership limitations would preclude innovative companies from taking advantage of significant economies of scale and scope), and Attachment B to APC Comments, "Economic Considerations in Determining the Number of PCN Licensees Per Market," at 3 (desirable industry conditions would result from the realization of significant scale economies and efficiencies), and at 12 (additional competitors after the second are much less effective in causing lower prices.) APC's studies support the premise that the advantages to consumers from economies of scale that in-market cellular carriers could provide far outweigh any potential disadvantage of having one or two fewer independent PCS providers in a given market.

³ MCI Comments, at 25.

A. Comments Favoring the Inclusion of Cellular Providers are Supported by Substantial Research and Valid Interpretations.

In contrast to the dearth of support for the parties supporting exclusionary policies, the overwhelming majority of factual and empirical support -- particularly economic studies -- promotes the eligibility of cellular carriers for PCS within their existing markets.⁴ For instance, National Economic Research Associates, Inc. ("NERA") examined the potential for lost economic efficiencies from the exclusion of cellular licensees in their own markets and found that consumers would end up paying higher than necessary prices due to both allocative and technical inefficiencies.⁵ Other economists predicted similar forfeitures of economies of scope and integration.⁶

⁴ It is important to keep in mind that CCI and other parties are not recommending that existing cellular carriers be assured of PCS licenses (as the Commission did for local exchange carriers in the original cellular rules). Cellular Communications Systems, 86 F.C.C. 2d 469, 483 (1981). Rather, the recommendation is merely to permit these qualified licensees to be one of (potentially numerous) applicants.

⁵ NERA, "Assigning PCS Spectrum," at 3-5 (submitted as a supplement to Comments by BellSouth).

⁶ See, e.g., Affidavit of Professor Alfred E. Kahn, at 8 (submitted with Comments of Bell Atlantic Personal Communications, Inc.); and Charles River Associates, "An Economic Analysis of Entry by Cellular Operators Into Personal Communications Services," at 35 (submitted with Comments of the Cellular Telecommunications Industry Association ("CTIA")).

The cost of foregoing these benefits would be warranted only if the alternative policy would impose even greater costs on the public. But when NERA and other economists performed this balance, they found that allowing cellular licenses to offer PCS in their service areas would produce substantial benefits and only negligible costs.⁷

The conclusion of these analysts correctly reflects the fact that the Commission has transformed the local mobile wireless market into a competitive one in which no one service provider can affect the performance of the market as a whole.⁸ As the total number of service suppliers increases, the anticompetitive effects of the loss of a single player (making the most conservative assumption that because it offers services in both cellular and PCS markets, an entity counts as one and not two competitors) decreases. The dangers all but disappear at the level of five market participants.⁹

Several commenters, including CCI, have emphasized the investments that current cellular providers have made in the na-

⁷ NERA report, at 9 et. seq.

⁸ See NERA, at 13, and Charles River Associates, at 38, both note specifically the potential impact of enhanced specialized mobile radio.

⁹ NERA shows a net "change in welfare" of 2.4% at 4 competitors, dropping to 0.33% with 8 market players. NERA, at 16. See also Kahn Affidavit, at 8; Charles River Associates, at 22.

tional communications infrastructure. The advent of PCS will require an infusion of even greater capital. One noted economist appropriately recognized that, if the communications industry expects the financial community to respond to its needs for capital to enter increasingly competitive markets, it must present borrowers who are qualified and creditworthy, not an assortment of entrepreneurs that are made eligible for PCS licenses because they have no experience or presence in a market.¹⁰ Hence, cellular providers present not only a lack of economic danger, but actually an affirmative distinct economic advantage for the development of PCS.

The exclusion of cellular providers from participation in PCS in markets they serve is a far-reaching and dangerous step. In the face of the depth and breadth of economic analysis presented in the comments filed with the Commission, such a decision would not only be completely unsupportable, but would be contrary to the public's interest in the rapid and efficient development of affordable PCS.

B. Comments Advocating the Exclusion of Cellular Providers Base Their Conclusions on Flawed Reasoning.

The Department of Justice ("DOJ") noted that the public interest is best served by market forces operating without intru-

¹⁰ Wayne D. Gantt, "Financial Analysis," at 3-5 (supplement to Comments of BellSouth).

sive economic regulation.¹¹ DOJ suggested an ideal situation of five or more firms in direct competition,¹² and based its recommendation for the temporary exclusion of cellular providers on two erroneous assumptions: first, that the relevant market is defined to include only cellular and PCS,¹³ and second, that the Commission will only authorize three PCS licenses in each market.¹⁴

The Commission appears to be considering barring cellular licensees because it believes that cellular and PCS will compete in a market made up of only PCS and cellular services and that an owner of two of the licenses will have the ability to reduce competition in the market. However, to adequately evaluate the degree of competition in the market for wireless mobile services, the Commission must evaluate the competition posed by all other potential purveyors of mobile communications services that make up the same market: enhanced specialized mobile radio ("ESMR"), advanced messaging services ("AMS"), and the low earth orbit ("LEO") and other mobile satellite service ("MSS") provid-

¹¹ DOJ Comments, at 3.

¹² Id., at 6.

¹³ Id., at 8.

¹⁴ Id., at 14.

ers.¹⁵ Additional sources of competition wait in the wings. The Commission's Office of Plans and Policy recently proposed that the Commission allow the voluntary reallocation of one commercial UHF Channel in each television market to establish a third cellular system.¹⁶

DOJ bases its concerns on a marketplace with five purveyors of mobile communications services, three PCS and two cellular. Counting ESMR only, the actual number will be higher. Of those commenters that offered advice regarding the number of PCS licenses to be awarded in each geographic area, the most frequent response -- by far -- was five. Not coincidentally, five was the largest number suggested as feasible in the Commission's NPRM.¹⁷ Nearly as many comments joined CCI in recommending that the Commission license the maximum number PCS providers in each market

¹⁵ With digital technology and compression techniques, ESMR has been characterized as having the technical feasibility to be the functional equivalent of cellular. Telecommunications Reports, 5,8 (February 18, 1992). See Fleet Call, Inc., 6 F.C.C. Rcd. 1533 (1991).

¹⁶ The authorization would be subject to a cost-benefit test that would make the reallocation more likely in urban areas where mobile communications needs are high and alternate sources of video programming are available. "Changing Channels: Voluntary Reallocation of UHF Television Spectrum," (OPP Working Paper 27, November 1992).

¹⁷ 7 F.C.C. Rcd. 5676, 5690.

that would be technically feasible.¹⁸ Indeed, at least one technical feasibility study demonstrates that more than 5 licensees could operate within the proposed PCS band.¹⁹ With all these existing and potential providers, DOJ's five-competitor market scenario -- which is the predicate underlying its position that cellular licensees should be excluded from PCS -- will be easily exceeded even if two PCS licensees are also cellular providers in each market.

DOJ admits that the Draconian measure of prohibiting an entire class of market participants is unwise under most circumstances.²⁰ In light of the high probability of error conceded by DOJ,²¹ and the likelihood that co-owned PCS and cellular operations could benefit the public through cost efficiencies,²² CCI contends that adopting DOJ's anticompetitive recommendation would be especially unwise.

¹⁸ See, e.g., CCI Comments, at 7. DOJ itself made this recommendation in its Comments, at 14.

¹⁹ See Charles L. Jackson Supplement to Bell Atlantic Comments, at 14.

²⁰ DOJ Comments, at 24.

²¹ "Today's forecasts of technological development and consumer demand will almost certainly prove erroneous." Id., at 29.

²² Id., at 27.

Although the National Telecommunications and Information Administration ("NTIA") appears to recommend the exclusion of cellular providers from the PCS arena, its comments are so conditional as to be useless. NTIA appropriately recognizes that, absent proof of anticompetitive results, society would benefit from market entry by all classes of potential PCS players.²³ It also recognizes the potential for greater productive efficiencies and economies of scope in co-owned cellular/PCS operations.²⁴ NTIA only speculates about unarticulated potential anticompetitive acts,²⁵ and bases its recommendation on an apparent desire to break the "cellular duopoly."²⁶ This reasoning is misdirected, especially because NTIA acknowledges a market for "cellular-like" services²⁷ that would include PCS yet it fails to recognize ESMR, AMS, LEO, MSS and UHF reallocation.

Perhaps most reflective of the lack of conviction in either DOJ's or NTIA's positions is that both DOJ and NTIA hedge their drastic recommendations by suggesting that cellular exclusion be merely a temporary step. NTIA suggests a review after

²³ NTIA Comments, at 25.

²⁴ Id., at 26.

²⁵ Id.

²⁶ Id., at 27.

²⁷ Id., at 26.

three years of PCS operation.²⁸ DOJ would have the prohibition sunset after a definite time period and gives four years as an example.²⁹ In the Midwest, where CCI co-owns several cellular systems, they would call this tactic saddling the horse after it left the gate. At the end of a three or four year wait in the "penalty box," the cellular industry would be left with the possibility of negotiating for secondhand licenses with initial licensees who were nothing more than speculators (hoping for profits from resale) or who failed to make PCS a going concern in the market³⁰. In the interim the public would have lost the cellular licensees' valuable expertise, proven track records, and willingness to invest in the community and new technology. Because it will promote the rapid and complete deployment of PCS, the public deserves the participation of willing, experienced providers from the very start.

²⁸ Id., at 26.

²⁹ DOJ Comments, at 30.

³⁰ As CCI demonstrated in its initial comments, speculators will always find a way into a licensing proceeding, particularly lotteries. CCI Comments at 21. Forcing cellular providers to wait in the wings until a PCS system has become operational will simply give speculators a greater incentive to build the minimum system necessary and then sell their system to cellular carriers. Cf. Bill Welch, 3 F.C.C. Rcd. 6502 (1988); Madison Cellular Telephone Company, 2 F.C.C. Rcd. 5397 (1987).

Other than the desire to simply maximize the number of different market participants, perhaps the only reasonable justification for excluding a class of providers from the PCS industry would be to avoid the anticompetitive use of bottleneck facilities. MIT professor of economics, Dr. Jerry A. Hausman, envisions advanced intelligent networks ("AINs") as the key to integrating landline, cellular, and PCS users.³¹ He notes that the AIN would be offered by an LEC, an IXC, or even a cable system or CAP network.³² All of these entities have the hardware capability to perform the integration necessary for an AIN, which has the potential of becoming the "bottleneck facility" of the PCS world. Members of each of these industries have shown strong interest in becoming PCS providers and they all have records of accomplishment and public service that recommend their inclusion in the PCS industry. Yet they have the potential for controlling a bottleneck facility that cellular providers do not possess. It would be completely arbitrary and illogical to exclude cellular while including competitors that could unfairly capitalize on their control of facilities.³³

³¹ Affidavit of Jerry A. Hausman, 4 November 1992, at 7 (submitted as "Attachment 1" to comments filed by Pacific Telesis Group).

³² Id., at 8.

³³ Nor will PCS providers have to interconnect to the PSTN through a cellular switch. Thus, cellular carriers will have no bottleneck control over PCS.

CCI does not advocate the exclusion of any of these players from the PCS marketplace. Nevertheless, because no supportable distinction can be made among categories of potential providers, the Commission should draw no arbitrary line and no class should be excluded.

The Commission is moving to make the local wireless market more competitive by adding spectrum to support new licensees and by permitting existing licensees greater flexibility in their use of new digital technologies. By altering the structure of the market, the Commission has eliminated the ability of any one supplier to distort competition. Thus, excluding an entire class of qualified applicants serves no public purpose.

II. Comments on Licensing Mechanisms and Regulatory Model Reflected Perceived Practicality and not True Preferences.

Because the Commission is formulating rules that will set the course of American personal communications extending far into the future, its choices must be those which truly will best serve the long-range public interest. The Commission should be wary of alternatives that are attractive only because they seem the easiest path to take, not because they represent superior long-term solutions. In two subject areas, licensing mechanisms and regulatory model, several comments noted this dilemma as they wistfully remarked about one possibility and then reluctantly recommended another.

Many comments reflected the multifaceted advantages of competitive bidding - auctions - for the selection of PCS licensees.³⁴ Many also recited the shortcomings of comparative hearings³⁵ and lotteries.³⁶ But, perhaps reflecting a Commission reluctance to seek Congressional approval of a plan to award licenses through auctions, these same commenters collectively held their noses and recommended something other than what they considered the best alternative.³⁷

On December 7, the Democratic Leadership Council's Progressive Policy Institute released Mandate For Change, which endorses the concept of spectrum licensing by auctions. When this new endorsement is added to the existing support in Congress for competitive bidding, the possibility of awarding PCS license through auctions no longer seems remote.³⁸

³⁴ See, e.g., Comments of Ameritech, at 31; Illinois Commerce Commission ("ICC"), at 11.

³⁵ See, e.g., Comments of Ameritech, at 33; Cablevision Systems Corporation ("CSC"), at 9; Sprint, at 15.

³⁶ See, e.g., Comments of Cincinnati Bell ("CB"), at 17; ICC, at 12; Sprint, at 16; Time Warner Telecommunications ("TWT"), at 20.

³⁷ Comments of Ameritech, at 35; CSC, at 9; CB, at 17; ICC, at 11; Pacific Telesis, at 32; Sprint, at 16; TWT, at 22.

³⁸ Robert J. Shapiro, Enterprise Economics and the Federal Budget, in Mandate for Change 21, 32 (Will Marshall and Martin Schram eds., 1993).

A similar situation took place with regard to comments on whether PCS should be regulated as a common carrier or as a private radio service. Many parties who believed that private radio regulation was more appropriate for PCS were motivated by a more important consideration, that cellular and PCS should have regulatory parity. Rather than suggest that the Commission reregulate cellular to match the realities of the marketplace, commenters found it more practical to suggest that PCS should match the shortcomings of cellular common carriage regulations.³⁹ As CCI stated in its comments, the Commission should instead regulate PCS and cellular in the manner best suited for their service objectives -- private radio -- rather than perpetuating earlier policy decisions that no longer are supported by market realities.

CCI submits that the needs of the public and the long term interests of the American communications system demand the best solutions available, even if they require additional political and administrative efforts. To that end, CCI restates its positions that PCS licenses should be awarded by auction and that the new medium should be regulated as private radio. The positions of the commenters support each of these choices despite the

³⁹ See Comments of Centel, at 26; McCaw Cellular Communications, Inc., at 43; Unites States Telephone Association, at 35. See also Comments of Ameritech, at 22; Bell Atlantic, at 30; GTE, at 52.

influence of Commission reluctance to move in new directions to best implement new technologies.

Conclusion

Some unmistakable directions emerge from the overwhelming volume of the comments. Because the local wireless, mobile market is competitive -- and becoming more competitive as a result of FCC decisions regarding PCS spectrum, and SMR regulations and technology among others -- the ability of any individual market participant to distort competition is precluded. No eligibility restrictions have been justified in this case. PCS licenses should be awarded to any qualified applicant through auctions open to any eligible participant, including those who now offer cellular service in the same markets. Once awarded, PCS should be regulated, as should cellular, according to private radio regulations.

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